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Hate Crime Legislation in Northern Ireland – An Independent Review

Consultation Response

by Dr Kim Barker and Dr Olga Jurasz

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Overview

We are responding to the Northern Irish Independent Review of Hate Crime consultation in our capacity as experts on social media abuse, online abuse, and online misogyny. We have in the past made significant contributions to UN calls for evidence on online harassment, and to the Bracadale Review on Hate Crime in Scotland, The One Scotland Hate Crime Legislation Review of the Scottish Government, and various UK Parliament inquiries addressing aspects of violence against women, gender-based hate, and online misogyny. In addition, we have made representations to the Scottish Government as to the need to amend legislation to cover a wider range of harassing and abusive behaviours online.

We have recently published a world-leading volume *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation* (Routledge 2019). We have been working on issues relating to harassment of women and girls in online spaces since 2013. We are possibly your only evidence respondents that have experience of the wider issues surrounding online harassment, and who take a holistic approach to the legal problems posed by such harassment, merging criminal law, gender, human rights, and internet law expertise.

We are only responding to selected questions from our expert perspectives, focussing on:

- Gender as part of the hate crime framework
- online harassment and abuse
- online misogyny
- social media abuse
- online violence against women
- responsibilities of social media platform providers.

QUESTION 11

Should gender and gender identity be included as protected characteristics in Northern Ireland hate crime legislation?

YES.

It is essential that gender is added as a protected characteristic in the NI hate crime legislation. This addition would enable the criminal justice system to adequately capture and record crimes committed with prejudice and/or hostility and/or bias towards a person on the ground of their gender. Whilst adding gender would extend to protecting not only women, this addition would particularly enable women to report crimes committed against them because they are women – something that has been omitted from the legislation in England & Wales, Scotland, and Northern Ireland thus far.¹

QUESTION 12

Should Transgender identity be included as a protected characteristic in Northern Ireland hate crime legislation?

NO.

As explained in the answer to Q11, adding gender would cover other groups, including transgender.

QUESTION 18

Do you consider that intersectionality is an important factor to be taken into consideration in any new hate crime legislation?

YES.

Intersectional approach is crucial to enable the official recognition of the fact that protected characteristics frequently intersect and are a key factor motivating hostility on not just a single ground (e.g. religion and gender). This approach would allow for greater visibility of multiple factors motivating hostility as well as improved recording of data on hate crimes – especially disaggregated data.

QUESTION 19

If you consider intersectionality to be an important factor to be taken into consideration in any new hate crime legislation, what is the best way to achieve this?

Please see Q18 above. Whilst it is not currently possible to uplift a sentence in lieu of all protected characteristics that played a role in motivating the commission of the criminal act, it is nonetheless crucial that adequate records are provided (including police records,

¹ K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019) 100-104.



sentencing remarks etc.) listing all protected characteristics in relation to which the hostility was demonstrated. This enables greater visibility of the context in which a crime was committed and factors that played a role in its commission. It also gives an official recognition of a number of harms, including social harms, suffered by the victims – especially where two or more characteristics intersect.²

QUESTION 21

Do you believe there is a need to introduce a statutory aggravation model of hate crime law similar to that which exists in Scotland and in England and Wales under the Crime and Disorder Act 1998?

YES.

A statutory aggravation based on gender hostility should be introduced. However, it must be recognised that a standalone aggravation is unlikely to ‘fit’ within the current hate crime statutory framework because there must be a protected characteristic enshrined in the law first. Therefore, we advocate for the introduction of gender as a protected characteristic in order to allow for a statutory aggravation to also be developed.

QUESTION 22

In dealing with an aggravated offence, should the court state on conviction that the offence was aggravated?

YES.

It is essential that the courts state that the offence was aggravated and elaborate as to the reasons why. This is crucial to ensure transparency as well as adequate recording of hate crimes within the official legal documents, such as sentencing remarks and judgments. Such statement would also be meaningful to the victims of hate crimes in that it would provide explicit and official recognition of the fact that hostility was a factor in commission of the offence against them.

QUESTION 30

Whether or not you believe that the term “hostility” should be defined or not, do you consider that this term should be expanded to include other terms such as “bias, hostility, prejudice, bigotry or contempt”?

NO.

In legal context, all six terms listed in the question would have specific and different meaning, as well as legal threshold to satisfy each of them. Therefore, it is not helpful to expand the

² K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019) 31-32, 101-102.



understanding of hostility to include these terms as this is likely going to lead to more confusion than clarity, especially in the legal application of these terms.

QUESTION 35

If gender, gender identity, age or other groups are included in the protected groups, should they also be included under the groups protected by the stirring up provisions in Part III of the Public Order (Northern Ireland) Order 1987?

YES.

We are of the view that there should be no hierarchy within the protected characteristics.³ The stirring up offences ought to be applied equally to all protected characteristics. The categories of protected characteristics operate in recognition of the fact that there are particular vulnerabilities attached to groups of people with certain features. Whilst there are historical and social reasons for the existing hierarchy, the only way to equalise this is to ensure that the stirring up offences are extended to cover all protected characteristics.

QUESTION 40:

Should social media companies be compelled under legislation to remove offensive material posted online?

YES.

It is unclear both within the question, and within the consultation paper itself what it is that is meant by offensive within the parameters of the hate crime landscape. There is a need to clarify what offensive material means, and whether something that is offensive can amount to hateful. Existing legislation does not define the term 'online hate' nor it is clarified through the common law. There exists a tendency to use terms 'online hate' and 'online offensive material' interchangeably, which leads not only to confusion, but also to inadequate provisions where there are legislative responses. There is of course, an overlap, and hateful content can – and is – posted online but there is a difference between offense, and hate. As we stated in 2017:

“‘online abuse’ refers to a much broader problem and can take a multiplicity of forms, not least that of online hate speech. Furthermore, not all abuse online amounts to online hate – a specific threshold would need to be satisfied in order to classify an instance of online abuse as an emanation of online hate.”

The challenge created by interchangeable terminology is a point illustrated by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion which commented on 'online abuse' more broadly, without drawing a clear distinction between online abuse, online hate speech and online hate crime.⁴ Furthermore, the

³ K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019) 95.

⁴ Report of the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion (September 2016) 17 (para.30).

Report narrowly refers to occurrences of ‘bullying or hate crime through social media platforms’ which fails to take into account other forms of online abuse which may, subject to the required threshold, be seen as forms of online hate.

Secondly, the dichotomy between online and offline environments needs to be challenged when addressing online hate (and online abuse in general). Traditionally, online and offline environments are viewed as separate and detached from one another. In particular, this is exacerbated by the perception that online is ‘not real’⁵ which then translates into flawed attitudes towards online and offline forms of abuse and violence. Very often hate starts online, and translates into acts of violence committed offline, resulting not only in multiple harms suffered by victims but also an identifiable transference of harm between what is perceived to be the ‘online’ and ‘offline’ contexts.”⁶

Equally, “Content which is not illegal but harmful should be categorised differently and subjected to a different review process. Segregating content between that which is illegal, and that which is harmful but not illegal may be one method of mitigating the volume of content to be dealt with in short time frames.”⁷

Social media companies struggle to deal with the volume of content posted online, and have not shown the capability to – reliably – act on content which is already illegal. Whilst there ought to be responsibility imposed on social media companies, the responsibility must be one which is workable otherwise there is little benefit to legislating on the point. There is also, of course, the issue concerning the location of the content and the illegality of the content in a particular jurisdiction. While there is ongoing law reform in other areas, we recommend that this point is considered in light of those.

QUESTION 41:

Are there lessons from the English and Welsh experience of the Public Order Act 1986 that may apply for Northern Ireland?

YES.

The provisions of the Public Order Act 1986 do not adequately capture the online elements of hate. There are gaps within sections 4, 4A and 5 which – whilst these sections could apply to social media – have hurdles in respect of the need to have someone within hearing or sight distance of the person making the threats.⁸ Such proximity elements – whilst essential for

⁵ K Barker and O Jurasz, ‘Gender, Human Rights and Cybercrime: Are Virtual Worlds really that different?’, in: M. Asimow, K. Brown, D. Papke (eds) *Law and Popular Culture: International Perspectives* (Cambridge: Cambridge Scholars Publishing, 2014).

⁶ K Barker & O Jurasz, ‘Submission of Evidence to Scottish Government Independent Review of Hate Crime Legislation’ (November 2017)

<http://oro.open.ac.uk/52612/1/Hate%20Crime%20Legislation%20Review%20%28Barker%20%26%20Jurasz%29.pdf>

⁷ K Barker & O Jurasz, ‘Online Harms White Paper Consultation Response’ (June 2019) (on file with author).

⁸ K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019), 55.

offline instances of potentially hateful behaviours, are problematic for the online application of such provisions.

QUESTION 43:

Should the term “publication” in the Public Order (Northern Ireland) Order 1987 be amended to include “posting or uploading material online”?

YES.

While the Public Order (NI) Order 1987 includes a definition of publication, this is not clearly defined as capturing material online. The current terminology in the Order deals with what amounts to a dissemination to the public but this does not expressly capture ‘online’ posting and sharing of content. Given that online posting and uploading is tantamount to publishing (a point social media companies are at pains to highlight so as to benefit from the lack of monitoring and editing roles, and the shield provided by the eCommerce Directive liability shield), there is a need to alter the term to include the publication of written material via online platforms.

QUESTION 44:

Should there be an explicit defence of “private conversations” in the Public Order (Northern Ireland) Order 1987 to uphold privacy protection?

YES.

Private conversations should be protected but given the lack of encryption on some platforms, the ideal of a privacy protection is one that requires some consistency. Similarly, by ‘private conversations’ what is envisaged here? One to one conversations and messages, messaging app uses, or for example, direct messaging on Twitter? One size fits all is a good starting point as a concept but is unworkable. For instance, if there is a hateful message directly sent via twitter, would the privacy protection prevent any action being taken? Ordinary privacy rights are all subject to limitation in the event of necessary situations so unless an inviolable right to privacy is envisaged, this will be difficult to implement, and could have dangerous unforeseen consequences.

QUESTION 45:

Should gender, gender identity, age and other characteristics be included as protected characteristics under the Public Order (Northern Ireland) Order 1987?

YES.

Gender should be included as a protected characteristic. This is necessary for consistency, but also because to continue to omit it from the Public Order (NI) Order 1987 would be to perpetuate a hierarchy of harms. Furthermore, in amending the Order, this would allow other

categories of behaviour to be captured, and would feed into the consistency with other jurisdictions in the UK.

QUESTION 46:

Should the Malicious Communications (Northern Ireland) Order 1988 be adapted to deal with online behaviour?

YES.

The focus of the Malicious Communications (NI) Order 1988 is on letters. Given the date at which this provision was introduced, there is a need to update it to reflect the ways in which communications can be malicious. The absence of online content coverage in the Order is problematic given the ways in which we communicate now. Ultimately, not amending the Order to include scope to capture online communications such as direct messages, emails, or other digital communications would be to mean the provisions are essentially not fit for purpose.⁹

QUESTION 47:

Should the wording of the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and the Communications Act 2003 use terms such as “grossly offensive”, “indecent” and “obscene”?

YES.

Yes. The wording of the Malicious Communications Act 1988, The Malicious Communications (NI) Order 1988, and the Communications Act 2003 should all adopt the same wording, and the same definitions for the behaviours and activities envisaged to be captured within their scope. Moreover, “the existing legislative framework appears to deal effectively with some isolated incidents of abusive behaviour online although fails to address instances of online hate under hate crime laws because online hate perpetrated through abusive communications currently falls outside of the current provisions.”¹⁰ Given the focus of the current review, it is important to place the potential proposals within the lens of hate provisions too, so that instances of online hate can be adequately captured, and where applicable, the relevant aggravator applied.

⁹ K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019), 68.

¹⁰ K Barker & O Jurasz, ‘Submission of Evidence to Scottish Government Independent Review of Hate Crime Legislation’ (November 2017)
<http://oro.open.ac.uk/52612/1/Hate%20Crime%20Legislation%20Review%20%28Barker%20%26%20Jurasz%29.pdf>, 4.



QUESTION 48:

Are the offences under the Malicious Communications Act 1988, the Malicious Communications (Northern Ireland) Order 1988, the Malicious Communications (Northern Ireland) Order 1988 and Communications Act 2003 too broadly drafted and require some modification to clarify and narrow their application?

YES.

Please see above at Question 47.

QUESTION 49:

Should online harm be part of a general law applying to hate crime?

The UK Government programme of business currently includes work on the Online Harms legislation. That said, whilst there is a need for online harm to be considered within the scope of hate crime, there is a need for the Online Harms provisions to appropriately capture online harms that are misogynistic in nature and motivation. This is not currently a feature of the proposals, and such harm is not listed amongst the 23 harms the Government envisage capturing in their White Paper. Online harms is a broad concept – understandably – but in order to avoid the creation and legislative implementation of a hierarchy of harms,¹¹ care needs to be taken to ensure that this is carefully addressed.

As we have stated elsewhere, “there is a pressing need for a greater understanding and acknowledgment of harm caused by online abuse communications generally and online hate specifically.”¹² Although the vast majority of reported instances on online hate involve celebrities and public figures, it is crucial that a clear message is sent through the legal system that online hate can affect anyone, irrespective of their public status. To that end, the focus should always remain on the person affected – irrespective of their gender – rather than their public status and should be given equal importance and consideration. This approach reinforces the importance and applicability of the principle of non-discrimination and equality before the law to cases involving online hate and online misogyny in particular. Furthermore, these principles are enshrined in the UK equality legislation as well as a number of international instruments which are ratified by the UK,¹³ and which therefore create legally binding obligations.

¹¹ K Barker & O Jurasz, ‘Text-based (sexual) abuse and violence against women: towards law reform?’ in J Bailey, A Flynn & N Henry (eds), *Handbook on Technology-Facilitate Violence and Abuse: International Perspectives and Experiences* (forthcoming 2021).

¹² K Barker and O Jurasz, ‘Online misogyny as hate crime: tweeting sense, slaying trolls’ (Society of Legal Scholars Conference, Dublin, September 2017).

¹³ Examples include: Article 14 ECHR (prohibition of discrimination), Protocol 12 to the ECHR (equality before the law), Article 20 EU Charter of Fundamental Rights (equality before the law), Article 15 Convention on Elimination of All Forms of Discrimination Against Women 1979 (women’s equality with men before the law), Article 3 (equal rights of men and women to the enjoyment of all civil and political rights) & Article 26 (equality before the law) International Covenant on Civil and Political Rights.